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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYBefore the
Federal Communications Commission

Washington, D.C. 20554

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| In re Applications of |) | MM DOCKET NO. 93-107 |
| DAVID A. RINGER |) | File No. BPH-911230MA |
| ASF BROADCASTING CORPORATION |) | File No. BPH-911230MB |
| WILBURN INDUSTRIES, INC. |) | File No. BPH-911230MC |
| SHELLEE F. DAVIS |) | File No. BPH-911231MA |
| OHIO RADIO ASSOCIATES, INC. |) | File No. BPH-911231MC |
| For a Construction Permit for |) | |
| a New FM Station on Channel |) | |
| 280A at Westerville, Ohio |) | |

To: Honorable Walter C. Miller
Administrative Law Judge

OPPOSITION TO MOTION TO ENLARGE ISSUES

David A. Ringer ("Ringer"), by and through counsel and pursuant to §§1.229 & 1.294 of the Commission's Rules (47 C.F.R. §§1.229 & 1.294), hereby submits his Opposition to the fourth "Motion To Enlarge Issues" ("Motion") filed by Ohio Radio Associates, Inc. ("ORA") on September 15, 1993. Like its predecessors, ORA's Motion is late-filed and fails to raise a substantial and material question of fact that would warrant enlargement of the issues. See 47 C.F.R. §1.229. In support whereof, the following is shown:

Timeliness

1. As the Presiding Judge has recognized, Motions To Enlarge were to be filed in this proceeding by May 24, 1993. ORA argues that its Motion is timely-filed because "it is based on August 31, 1993, hearing testimony of Ringer...."

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Motion at p. 1. However, ORA's entire argument is actually based on information that it has had at its disposal for several months. For example, if it had wanted to timely raise this issue, ORA could have taken the time to hire engineering professionals to investigate the question of whether all of Ringer's residences were within the 1.0 m/Vm contour of the proposed station. A copy of Mr. Ringer's Integration Statement was first made available to all parties, including ORA, on May 10, 1993 and this filing included the residences in question. Furthermore, ORA could have challenged these residences during the evidentiary admission session in this proceeding on August 20, 1993. If it had truly wanted to, ORA could have filed its Motion and timely raised this issue. ORA was not entitled to sit back and hope that a case against Mr. Ringer would develop during the course of the proceeding. Like its most recent Motion To Enlarge it filed against Mr. Ringer, ORA's instant filing is "tardy in the extreme" and should be denied. See Memorandum Opinion and Order, Fcc 93M-603, released September 22, 1993.

No Intentional Misrepresentation Has Occurred

2. Even if its arguments are given full consideration, ORA has not shown that enlargement of the issues is warranted. The crux of ORA's inquiry is "whether Ringer made knowing and intentional misrepresentations in his hearing exhibit as to his past residences within the 60

Dbu contour of his proposed station." Motion at p. 2. However, the facts clearly show that Mr. Ringer made an honest mistake that was the result of a very close engineering analysis.

3. As he explains in his attached Declaration, Mr. Ringer recently discovered that some of his local residences were actually outside of the 1.0 m/Vm contour. See Exhibit A. In July 1993, while attending the deposition of Shellee Davis in this proceeding, Mr. Ringer was first alerted to this issue. Id. Upon discovering that opposing counsel had questioned whether all of Ms. Davis' residences were within the service area of the proposed station, Mr. Ringer further investigated this issue with respect to his own local residences. Id. Counsel explained to Mr. Ringer that the cut-off point for local residence credit was the 1.0 m/Vm contour line. Id. After reviewing a copy of the Joint Engineering Exhibit Map that depicted his station's proposed service area, Mr. Ringer discovered that some of his claimed local residences were outside of the 1.0 m/Vm contour and he quickly filed an amendment to his application and Integration Statement. Id.

4. Mr. Ringer further explains:

"While the scale of the Joint Engineering Map was rather large, I did carefully review it and I was able to verify the location of each of my residences. While some of my residences were clearly outside the 1.0 m/Vm contour, I believed that three residences, 1000 Urlin Avenue, 600 E. Town Street and 417 West Sixth Avenue, were located in areas that fell within the 1.0 m/Vm

contour as it appeared on the map."

Id.

5. It was not until after this matter was raised at hearing that Mr. Ringer realized that two of his residences, 1000 Urlin Avenue and 600 E. Town Street, were slightly outside the 1.0 m/Vm contour. Id. A review of the record shows that both addresses are very close to the service area. The 1000 Urlin Avenue address is 1.4 kilometers outside the line and the 600 E. Town Street address is 1 kilometer outside. Tr. 280-281 and Davis Exhibit 5. Given the fact that, on the scale of the Joint Engineering Map, one kilometer is less than one eighth of an inch, it is not surprising, therefore, that Mr. Ringer believed that his residences were within the proposed service area. See Exhibit B. Mr. Ringer states that "...when I reviewed the locations of these two residences on the Joint Engineering Map, it appeared to me that they were both within the 1.0 m/Vm contour. I had no reason to believe that each was slightly outside and would not qualify for credit." Exhibit A at p. 2.

6. As these facts show, the inclusion of certain local residences in Mr. Ringer's hearing exhibit was a good faith error and, more importantly, was not an intentional attempt to deceive the Commission. Contrary to ORA's belief, no willful intent to deceive can automatically be inferred from the facts in this case. Mr. Ringer has never

attempted to hide information from the Commission. In fact, the information in question appeared in Mr. Ringer's original application, as well as his Integration Statement, and other parties have had ample opportunity to test the bona fides of his claim for local residence. See Garrett, Andrews and Letizia, Inc., 86 FCC 2d 1172, 1177 (Rev. Bd. 1981). Furthermore, ORA inaccurately states that the residences that Mr. Ringer claimed credit for "are not even close to the service contour." Motion at p. 2. To the contrary, the record shows that each of the residences in question was less than 1.5 kilometers outside the 1.0 m/Vm contour. See 280-281 and Davis Exhibit 5. Considering the scale of the Joint Engineering Map, Mr. Ringer's conclusion that he believed that these residences were inside the service area is not unreasonable. See Exhibit B. ORA's attempt to paint Mr. Ringer as grossly negligent or wantonly careless is unfair and not supported by the record.

7. ORA has failed to show that Mr. Ringer knowingly and intentionally included this information in his hearing exhibit with the intent to deceive the Commission. Therefore, ORA has failed to make a prima facie case for the addition of a misrepresentation issue against Mr. Ringer. In several decisions, the Commission has stated that a finding of misrepresentation requires the element of willfulness. See Weigel Broadcasting Company, 2 FCC Rcd 1206, 1211 (1987); Fox River Broadcasting, Inc., 93 FCC 2d

127, 130 (1983) and Bluegrass Broadcasting Company, 43 FCC 2d 990, 994 (1973). No such willful deceit is present in this case and the addition of a misrepresentation issue is not appropriate. Where, as here, the facts show that an applicant's error was inadvertent and not intentional and that no deceptive intent was apparent, no misrepresentation can be found. See Magdalene Gunden Partnership, 3 FCC Rcd 488, 489-90 (Rev. Bd. 1988); Weigel Broadcasting Company, supra at 1208; and Garrett, Andrews and Letizia, Inc., supra at 1177. The record supports a similar outcome in this case.

WHEREFORE, the above-premises considered, David A. Ringer hereby respectfully requests that the fourth Motion To Enlarge Issues filed by ORA be **DENIED**.

Respectfully submitted,
DAVID A. RINGER

By:


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His Attorneys

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September 29, 1993

EXHIBIT A

DECLARATION

David A. Ringer, under penalty of perjury, declares as follows:

1. I am an individual applicant for a new FM station at Westerville, Ohio. I have reviewed the third Motion To Enlarge Issues that was filed against me by Ohio Radio Associates, Inc.

2. As I explained in a previous Declaration I supplied in this proceeding, I met on July 15, 1993 in Washington, D.C. with counsel to prepare for my deposition in the Westerville proceeding. Earlier in the day, I attended the deposition of another applicant, Shellee Davis and, at that deposition, the issue was raised as to whether all of Ms. Davis' local residences were located within the proposed service area of the Westerville station. As it turns out, some of her residences were not located in the service area and she was forced to file an amendment. After returning to his office, my attorney advised me to double-check a copy of the Joint Engineering Exhibit and to verify whether all of the local residences that I had included in my Integration Statement were, in fact, located within the proposed service area. I reviewed the map that was included with the Joint Engineering Exhibit and which depicted my station's proposed service area. It was at this point, for the very first time, I realized that some of the residences, that were listed in my original application and in the Integration Statement I exchanged in the Westerville proceeding, were not located within the 1.0 m/Vm contour, as shown on the Joint Engineering Exhibit map.

3. Counsel immediately explained to me the significance of this error and, with the assistance of counsel, I prepared an amendment to my application and Integration Statement to withdraw two of my local residences as being located within the service area. This mistake was completely inadvertent and was a result of a misunderstanding I had concerning which of my past local residences would qualify for credit. I believed that, if the signal of the proposed station could be heard at a specific location, then this location was considered part of the station's service area and that I could claim credit for my past local residence within that area. I realized, after discussing this matter with counsel, that any residence that was located outside of the 1.0 m/Vm contour of the station, as it appears in the Joint Engineering Map, does not qualify for credit.

4. While the scale of the Joint Engineering Map was rather large (one kilometer is less than an eighth of an inch), I did carefully review it and I was able to verify the location of each of my residences. While some of my residences were outside the 1.0 m/Vm contour, I believed that three residences, 1000 Urlin Avenue, 600 E. Town Street and 417 West Sixth Avenue, were

located in areas that fell within the 1.0 m/Vm contour as it appeared on the map. Therefore, I included these three addresses in my Direct Case Exhibit that was entered into evidence on my behalf in this proceeding.

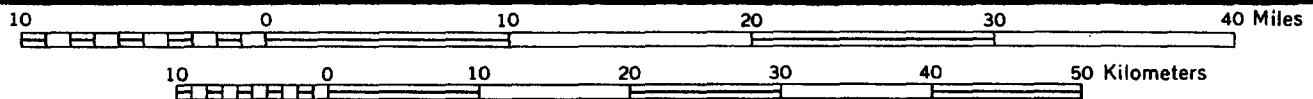
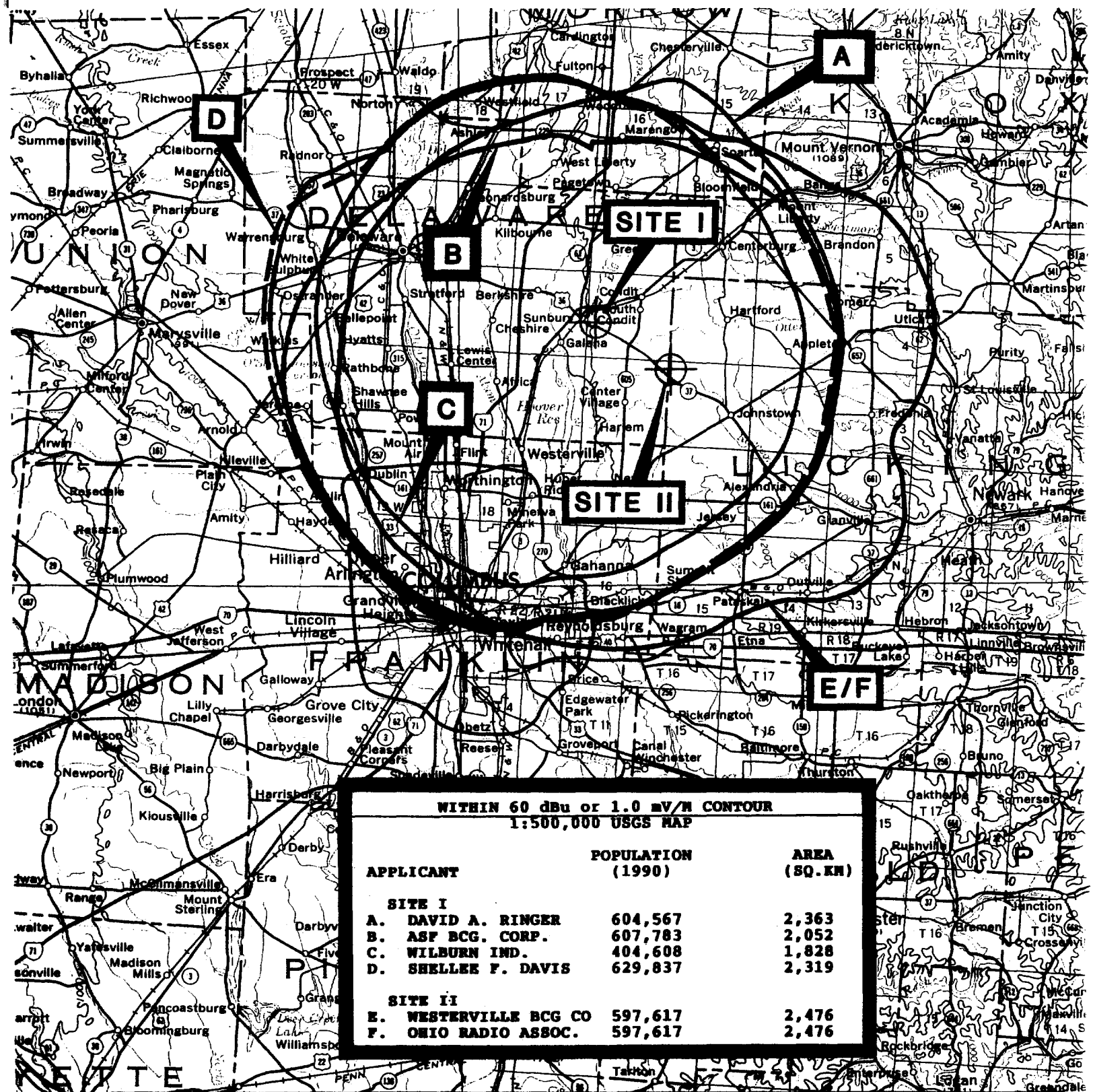
5. It was not until this matter was raised at hearing that I realized that two locations, 1000 Urlin Avenue and 600 E. Town Street, were actually slightly outside the 1.0 m/Vm contour. As for 1000 Urlin Avenue, I understand that this location is 1.4 kilometers outside the line and that 600 E. Town Street is 1 kilometer outside. However, when I reviewed the locations of these two residences on the Joint Engineering Map, it appeared to me that they were both within the 1.0 m/Vm contour. At the time I was preparing my direct case, I had no reason to believe that each was slightly outside and would not qualify for credit. This was an honest mistake on my part and I believe a very close call, given the scale of the map that I was using. I never intended to mislead the Commission in any way nor to falsely claim credit for something that I am not due. I have once again recognized this error and I have filed an amendment to both my application and Integration Statement. I accept the fact that I will not receive any credit for these two local residences.

Executed this 27 day of September, 1993.



DAVID A. RINGER

EXHIBIT B



COMPETING 60 dBu CONTOURS
JOINT ENGINEERING EXHIBIT
MM DOCKET 93-107
Ch. 280A - WESTERVILLE, OHIO

MULLANEY ENGINEERING, INC.
GAITHERSBURG, MARYLAND

FIGURE 1
JUNE 1993

CERTIFICATE OF SERVICE

I, Lori Paige DiLullo, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 29th day of September, 1993, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

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